SUPREME COURT CRIM. NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re JOSEPH BONILLA on Habeas Corpus.	Court of Appeal No. B248199 Los Angles County Superior Court No. BA320049

PETITION FOR REVIEW OF PETITIONER JOSEPH BONILLA FROM THE PUBLISHED DENIAL OF HIS PETITION FOR WRIT OF HABEAS CORPUS BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner respectfully requests this Court grant review following the denial of his petition for writ of habeas corpus in a published decision by the Court of Appeal, Second Appellate District, Division Two, on October 29,

2013. A true and correct copy of the published opinion denying the petition for writ of habeas corpus is attached hereto as Attachment A.[1]

ISSUES PRESENTED FOR REVIEW

1. Does the enactment of Senate Bill No. 260 (SB 260), codified as Penal Code section 3051, which provides for a "juvenile opportunity parole hearing" for "any prisoner who was under 18 years of age at the time of his or her controlling offense" render moot any claim that the juvenile offender's sentence violated the Eighth Amendment prohibition on cruel and unusual punishment because the sentence was imposed without consideration of the factors[2] set forth in *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*) and did not afford him a meaningful opportunity for release on parole at the time of his initial sentencing hearing?

2. Does SB 260 render moot the question of whether *Miller* applies retroactively to cases that were final on appeal before *Miller* was decided?

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[1] A petition for review in *In re Jose Armando Alatriste* on Habeas Corpus (Case No. S214652) was received by this Court on November 15, 2013. The issues presented for review in the two petitions are the same with the addition of the third issue presented here. This petition for review also discusses, *post*, the October 30, 2013, decision of the Pennsylvania Supreme Court in *Commonwealth v. Cunningham* (Oct. 30, 2013, No. 38 EAP 2012) [http://www.pacourts.us/assets/opinions/Supreme/out/J-68-2013mo.pdf?cb=1], which the *Alatriste* petition erroneously listed as not yet having been decided.

[2] The "*Miller* factors" as used herein refer to the hallmark features of youth, as well as the individual defendant's background and upbringing, mental and emotional development, and possibility of rehabilitation. (See *Miller*, *supra*, 567 U.S. ___ [132 S.Ct 2455, 2468].)

3. Does *Miller* apply retroactively to California prisoners such as petitioner who is presently serving a 50 years to life sentence for offenses committed when he was a minor and whose direct appeal was final at the time *Miller* was decided?[3]

NECESSITY FOR REVIEW

Review by this court is necessary to secure uniformity of decision and to settle important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).)

STATEMENT OF THE CASE AND STATEMENT OF FACTS[4]

In 2005, petitioner, Joseph Bonilla, was charged by a single-count amended indictment with murder, in violation of Penal Code[5] section 187, subdivision (a). (2CT 375.) It was further alleged that he personally and intentionally discharged a firearm which proximately caused great bodily

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[3] The Court of Appeal first summarily denied petitioner's petition for writ of habeas corpus raising this exact question on April 29, 2013. On July 17, 2013, in Case Number S210650, this Court granted petitioner's petition for review and remanded the matter back to the Court of Appeal with an order that the Secretary of the Department of Corrections show cause as to why the requested relief should not be granted and why *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 455] should not be afforded retroactive effect. The published opinion that petitioner now seeks review of refused to reach the merits of either question raised in this Court's order granting review and remand, finding instead that the passage of SB 260 renders the questions moot.

[4] Concurrent with this petition for review, petitioner is filing a request that this Court take judicial notice of the record in the related direct appeal, Case No. B205363, as well as this Court's own files in Case No. S220650. All citations to the record are to the Clerk's Transcript and Reporter's Transcript in Case No. B205363.

[5] All further references are to the Penal Code unless otherwise specified.

injury and death (§ 12022.53, subd. (d)), that a principal personally and intentionally discharged a firearm which proximately caused great bodily injury and death (§ 12022.53, subds. (d) & (e)(1)), and that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).[6] (2CT 376.)

The offenses were alleged to have occurred on August 12, 2005, when petitioner was a minor. (2CT 376; Welf. & Inst. Code, § 707, subd. (d)(1).)

Following a jury trial, petitioner was convicted of first degree murder, and all of the special allegations were found true. (2CT 488-489.)

Petitioner's motion for a new trial was denied, and he was sentenced to 50 years to life, consisting of 25 years to life for first degree murder, plus an additional 25 years to life for the personal discharge of a firearm causing death (§ 12022.53, subd. (d)), with a 15-year minimum parole eligibility (§ 186.22, subd. (b)(5)). (2CT 514; 6RT 704.)

Petitioner was sentenced on January 14, 2008. (2CT 514) The total sentence imposed 50 years to life, consisting of 25 years to life for first degree murder, plus an additional 25 years to life for the personal discharge of a firearm causing death (§ 12022.53, subd. (d)). (2CT 514; 6RT 704.)

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[6] Pursuant to Welfare and Institutions Code section 707, subdivisions (d)(1), (d)(2)(a), (d)(2)(b), and (d)(2)(C)(ii), petitioner, who was a minor at the time of the offense, was charged in the superior court, rather than in the juvenile court.

Petitioner received credit for 882 actual days spent in custody. (2CT 515.) There was no discussion of any sentencing discretion whatsoever.

Petitioner filed a timely notice of appeal on January 14, 2008. (2CT 516.) No issue relating to petitioner's sentence other than a clerical error was raised in the direct appeal. The Court of Appeal affirmed petitioner's conviction in an unpublished decision on March 19, 2009, in Case No. B205363.

A petition for review was filed in this court which was denied on June 10, 2009, in Case No. S172068.

The United States Supreme Court decided *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct 2455] (*Miller*) on June 25, 2012.

On April 29, 2013, the Court of Appeal summarily denied the petition for writ of habeas corpus.

On July 17, 2013, this Court granted review and transferred the matter to the Court of Appeal. The Court of Appeal was ordered to vacate its summary denial dated April 29, 2013, and was further ordered to issue an order to show cause, returnable before that court. The Secretary of the Department of Corrections and Rehabilitation was ordered to show cause, when the matter is placed on calendar, why petitioner was not entitled to relief based on his allegation that his sentence of 50 years to life for crimes

committed when he was a juvenile violates the Eighth Amendment's prohibition on cruel and unusual punishment because it offers no meaningful opportunity for release on parole and why *Miller* should not be accorded retroactive effect.

On October 29, 2013, the Court of Appeal, in a published decision ruled that both issues raised in this Court's July 17, 2013 order were rendered moot by SB 260 and refused to reach the merits of either issue mentioned in this Court's order. (Attachment A.)

This timely petition for review follows.

ARGUMENT

I.

REVIEW SHOULD BE GRANTED TO DETERMINE IF SB 260 CAN RENDER MOOT THE QUESTION OF WHETHER A DEFENDANT'S SENTENCE VIOLATED THE EIGHTH AMENDMENT AS INTERPRETED BY *MILLER* THAT JUVENILE OFFENDERS BE SENTENCED IN A MANNER WHICH PROVIDES A MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE BASED ON DEMONSTRATED MATURITY AND REHABILITATION

In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), this Court held that

> sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them **at sentencing** of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.

(*Id*. at p. 268, emphasis added.) It is now recognized that these same rules apply to juveniles convicted of homicide offenses. (*Miller*, *supra*, 132 S.Ct. at p. 2460.)

Miller concluded that even for juvenile homicide offenders, a mandatory sentence of life imprisonment without the possibility of parole

violates the proportionality requirement of the Eighth Amendment to the United States Constitution because it requires "that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes." (*Miller*, *supra*, 132 S.Ct. at p. 2475.)

The sentence petitioner challenges here did not comply with *Miller's* adjuration that its exercise of discretion in sentencing a juvenile offender must take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

The newly enacted Penal Code section 3051 does nothing to provide any new discretion to a sentencing court and gives a sentencing court no ability to treat children any differently when sentencing them. All the statute does is provide for a "Youthful Offender Parole Hearing" deep in the future. That hearing would once again involve no judicial discretion. That hearing, as governed by the Penal Code section 3051, cannot come any sooner than the 25th year of petitioner's incarceration, assuming the statute even remains on the books.[7] The statutes does nothing to alter the fact that petitioner's sentence

[7] The Court of Appeal found that there was no "constitutional infirmity in requiring petitioners to serve 20 or 25 years before they have the opportunity to demonstrate that they have been rehabilitated . . . ." (Opn. 8.) Petitioner believes that both he and Mr. Alatriste, whose petition was decided together in joint published opinion, are each subject to no less than 25 years under section 3051 before they may ever have a parole hearing. Each had an offense or enhancement for which the trial court imposed a sentence of 25 years to life.

remains "50 years to life."

Newly enacted section 3051, subdivision (b)(3), provides that "any prisoner who was under 18 years of age at the time of his or her controlling offense and who was sentenced to an indeterminate base term of 25 years to life will receive a hearing during the 25th year of incarceration."

Contrary to the Court of Appeal's conclusion that this renders the points raised in the petition for writ of habeas corpus moot, the new law does not comply with the central concern of the *Miller* court, which now requires a sentencing court "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2469].)

Petitioner submits that this Court recognized in *Caballero*, the dictates of *Miller* must be followed **at sentencing**, not years later by a parole board.

> Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them **at sentencing** of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.

(*Caballero*, *supra*, 55 Cal.4th at p. 268, emphasis added.)

The newly enacted statute, while designed to provide an inmate with the opportunity to show he or she has matured over a period of many years and is

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(See section 3051, subd. (a)(2)(b) [defining "controlling offense"].)

deserving of the possibility of release through a future parole hearing, does nothing to remedy a sentence that was unconstitutional the outset.

Moreover, there is no guarantee that the statute cannot be altered or removed entirely. Petitioner's sentence remains "50 years to life," and the whims of the electorate and Legislature in enacting, modifying, or withdrawing legislation cannot alter the fact that the judicially imposed sentence he received was unconstitutional at the outset and remains unconstitutional. Petitioner's sentence violated the Eighth Amendment. He must be resentenced by a judge. He cannot be "resentenced" by Legislative action.

In addition to the concerns that the new statute may not even exist years from now, petitioner submits removing the role of the judiciary in resentencing someone in petitioner's position violates the prohibition on separation of powers. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) "The matter of ultimate sentencing is a matter of judicial discretion to be exercised within limits prescribed by the Legislature." (*People v. Superior Court* (1978) 82 Cal.App.3d 909, 916.)

Because there is no guarantee that the new statute will remain on the books 25 years from now, and because all defendants have the right to sentence that does not violate the prohibition against cruel and unusual punishment that is imposed by a judge, petitioner is entitled to judicial remedy of the Eighth Amendment violation at this time. Petitioner is entitled to a new sentencing hearing where he is afforded an opportunity for parole which is part of his judicially imposed sentence and which cannot be removed or altered by changes in legislation.

Nothing in section 3051 requires or allows for the sentencing court to recall a sentence and consider the individualized sentencing factors mandated by *Miller*. The Legislative findings in support of the new statute militate in favor of petitioner being resentenced:

> The Legislature finds and declares that, as stated by the United States Supreme Court in *Miller v. Alabama*, 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including 'parts of the brain involved in behavior control. The Legislature recognizes that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society.

(Senate Bill No. 260 (2013-2014 Reg. Sess.)

But the statute does nothing to recall petitioner's sentence or require that he be resentenced. The sentence remains. The new statute only affords him a possible parole hearing after a lengthy term incarceration, if the statute remains law and is not altered. The protections of a judicially mandated future parole hearing are not afforded to a defendant such as petitioner unless he is resentenced.

The Legislature simply cannot fix a sentence that is unconstitutional and which violated *Miller* at the outset without requiring a new sentencing hearing.

The Court of Appeal observed that "[i]n practice, the directives of *Graham*, *Miller* and *Caballero* have proved challenging for trial courts." (Opn. 5.) Despite what may have been good intentions, what the Legislature has done in enacting section 3051 does not change the fact that a sentence like petitioner's, which did not take into account the *Miller* factors at the time of sentencing, runs afoul of the Eighth Amendment.

This Court appeared to recognize as much in *Caballero*, when it stated that it is the sentencing court which must evaluate factors, such as the defendant's "physical and mental development," in order to determine when the defendant might attain a sufficient level of maturity to warrant release on parole. (*Caballero*, *supra*, 55 Cal.4th at p. 269.) *Caballero* did not say that

this is a task that a sentencing court can delegate to a parole board to be undertaken 25 years later.

In *People v. Ramirez* (2013) 219 Cal.App.4th 655, Division Three of the Fourth Appellate District was recently presented with a parallel argument. There, newly enacted Penal Code section 1170, subdivision (d)(2), which applies in cases where LWOP sentences have been imposed on juvenile offenders, was at issue.

In *Ramirez*, section 1170, subdivision (d)(2) was cited by the Attorney General for the proposition that it ensures that sentencing juveniles to LWOP in California no longer runs afoul of *Miller*. (*Ramirez*, *supra*, 219 Cal.App.4th at pp. 686-687.) To the contrary, the *Ramirez* court found that the statute cannot fix a sentence that is unconstitutional at the outset, and that the enactment of the statute militated in favor of reversing the LWOP and LWOP equivalent sentences imposed. This is so, in part, because "there is no guarantee the provision would still be in effect in roughly 13 years when [Ramirez] might have had his first opportunity to utilize it." (*Ibid*.)

Similarly, unless the sentence imposed on petitioner was itself the product of an exercise of discretion that "'[took] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison' (*Miller*, *supra*, 567 U.S. at p. __ [132 S.Ct. at p.

2469], fn. omitted)," the sentence is cruel and unusual punishment. (*Ramirez*, *supra*, 219 Cal.App.4th at pp. 683-684.)

Creating a statute such as SB 260 that might allow for parole in the future, should that statute remain on the books, does not alter the fact that the sentence imposed herein violated the Eighth Amendment at the time it was imposed, and that sentence remains in violation of the Eighth Amendment.

The *Ramirez* court rightly found that the enacting of section 1170, subdivision (d)(2)

> supports the conclusion that imposing LWOP sentences on juvenile offenders or imposing lengthy sentences that operate as the functional equivalent of LWOP and preclude the juvenile from obtaining a parole-type review within a reasonable period of time, constitutes cruel and unusual punishment.

(*Ramirez*, *supra*, 219 Cal.App.4th at p. 687.)

Petitioner had the right to have a judge exercise judicial discretion at the time he was sentenced. Legislative action cannot and should not substitute for constitutionally required, individualized sentencing before a judge. Review should be granted, and petitioner should be given a new sentencing hearing.

II.

REVIEW SHOULD BE GRANTED TO DETERMINE IF *MILLER* IS TO BE APPLIED RETROACTIVELY TO DEFENDANTS SUCH AS PETITIONER WHO WERE JUVENILES AT THE TIME OF THEIR OFFENSE AND ARE PRESENTLY SERVING A SENTENCE THAT IS THE FUNCTIONAL EQUIVALENT OF LWOP, BUT WHICH WAS FINAL BEFORE *MILLER* WAS DECIDED[8]

A. Introduction And Procedural Background

Petitioner was born on February 7, 1989, and was 16 years old at the time of his offenses. He was 18 years old when he was sentenced on January 14, 2008, to 50 years to life in prison. (2CT 514.) There was no discussion of any sentencing discretion at petitioner's sentencing hearing, and no discussion of the mitigating factors discussed in *Miller*, namely the differences between juveniles and adults "and how those differences counsel against irrevocably sentencing [a juvenile] to a lifetime in prison." (*Miller*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2469], fn. omitted.) Trial counsel made no objection to

[8] Arguments II and III are copied largely from the petition for review in Case No. S220650. This Court granted review, but the issues raised herein were never reached on remand. The arguments are repeated here to forestall any argument that petitioner has waived or forfeited the arguments should he be required to seek redress in federal court because generally no incorporation by reference is permitted in a petition for review. (Cal. Rules of Court, rule 8.504(e)(3).) Recent decisions from other jurisdictions are also noted and addressed.

the sentence being cruel and unusual, and no issue relating to cruel and unusual punishment was raised in petitioner's direct appeal.

B. Review Should Be Granted To Answer The Question Of Retroactivity

Petitioner will continue to serve the functional equivalent of LWOP unless and until *Miller* is applied retroactively. Petitioner has found no published California case on point, and it does not appear that this Court has granted review on any case which would answer this important question. Courts from other jurisdictions that have answered this question are in conflict.

At best, there appears to be confusion among legal scholars and the various courts as to whether *Miller* is to be applied retroactively to sentences like petitioner's whose direct appeals are complete. (See *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases* (2012) 20 George Mason L. Rev. 29, fn. 3.)

1. Miller Announced A New Substantive Rule That Must Be Applied Retroactively

Petitioner is of the belief that *Miller* announced a watershed new substantive rule of criminal procedure which affects the fundamental fairness of the proceedings, and thus, must be applied retroactively. (*Teague v. Lane* (1989) 489 U.S. 288 (*Teague*).) In *Teague*, the United States Supreme Court held that, as a general rule, "new constitutional rules of criminal procedure"

will not be applied retroactively to cases which were final "before the new rules are announced." (*Id*. at p. 310.) "Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review" requires the court to determine if "the rule is actually 'new.'" (*Beard v. Banks* (2004) 542 U.S. 406, 411 (*Beard*).) "[I]f the rule is new, the court must consider whether [the rule] falls within either of the two exceptions to nonretroactivity." (*Ibid*.)

"A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a '"watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'" (*Whorton v. Bockting* (2007) 549 U.S. 406, ___ [127 S. Ct. 1173, 1180].)

Additionally, *Teague*'s more general bar on retroactive application of new rules does not apply to those rules "forbidding punishment 'of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' [Citations.]" (*Beard*, *supra*, 542 U.S. at pp. 416-417.) It also does not apply to "'"watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'" (*Graham v. Collins* (1993) 506 U.S. 461, 478 [113 S.Ct. 892].)

There can be little doubt that the holding of *Miller* must be applied retroactively because its holding is not just "new," but represents a watershed and substantive change in the law implicating the fundamental fairness of the proceedings and also is a new rule prohibiting a certain category of punishment for a class of defendants because of their status.

Courts in other states have either not yet decided this issue or are in conflict as to whether *Miller* is fully retroactive and, pursuant to *Teague*, must be applied on collateral review to cases final before *Miller* was decided. (See, e.g., *State v. Williams*, 2012 IL App (1st) 111145 (Nov. 27, 2012) [http://www.state.il.us/court/Opinions/AppellateCourt/2012/1stDistrict/1111145.pdf, as of April 30, 2013][Illinois, holding *Miller* is fully retroactive]; *State v. Morfin*, 2012 IL App (1st) 103568 (Nov. 30, 2012) [http://www.state.il.us/court/Opinions/AppellateCourt/2012/1stDistrict/1103568.pdf, as of April 30, 2013] [Illinois, holding same]; *State v. Ragland* (Iowa Sup. Ct.) 2013 Iowa Sup. LEXIS 93; see also *State v. Simmons* (La. 2012) 99 So. 3d 28 [remanding for a sentencing hearing under *Miller*]; but see *Geter v. State*, No. 3D12-1736 (Fla. 3rd DCA Sept. 27, 2012) [Florida District Court ruling that *Miller* is not retroactive [http://www.3dca.flcourts.org/Opinions/3D12-1736.pdf, as of April 30, 2013].)

Additionally, although in dicta, a federal district court fervently admonished,

> if ever there was a legal rule that should – as a matter of law and morality – be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice.

(*Hill v. Snyder* (E.D.Mich. Jan. 30, 2013) 2013 WL 364198, 2 [emphasis in original].)

2. Because Miller's Companion Case Was Decided On Collateral Review, The New Rule Applies Retroactively To Petitioner And Those Similarly Situated

Petitioner also submits that *Miller's* companion case, *Jackson v. Hobbs*, announced a new rule on collateral review; and, thus, the new rule applies retroactively to all similarly situated cases, including petitioner's. Given the United States Supreme Court's application of *Miller* retroactively to cases on collateral review, further analysis under *Teague* and its progeny is not even necessary. This is so because the Court has already answered the question of retroactivity by applying *Miller* to cases on collateral review.

In *Miller*, the Court addressed and vacated the sentences of both Evan Miller and Kuntrell Jackson. (*Miller*, *supra*, 132 S.Ct. 2455.) However, while Miller's challenge before the Supreme Court was on direct review, Jackson's

conviction, like that of petitioner herein, became final long before the Court's announced its new rule in *Miller*. (*Id*. at p. 2461.) Had *Miller* not applied retroactively to cases on collateral review, *Jackson* would have been precluded from the relief he was granted. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." (*Teague*, *supra*, 489 U.S. at p. 300.) Therefore, if a new rule is announced and applied to a defendant on collateral review, like the Court did in *Miller*, that rule is necessarily retroactive. (See also *Tyler v. Cain* (2001) 533 U.S. 656, 663 ["The new rule becomes retroactive, not by the decisions of the lower court, or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court."]

On October 30, 2013, the Pennsylvania Supreme Court ruled in a 4-3 decision that *Miller* does not apply retroactively on collateral review. (*Commonwealth v. Cunningham* (Oct. 30, 2013; No. 38 EAP 2012) (*Cunningham*).) In the dissent, Justice Baer, joined by two of his colleagues found the fact that *Miller's* companion case, *Jackson v. Hobbs*, was decided on collateral review militated strongly in favor of retroactive application to all defendants similarly situated. (*Cunningham*, at slip opn. p. 5 (dis. opn. of

Baer, J.) [http://www.pacourts.us/assets/opinions/Supreme/out/J-68-2013do.pdf?cb=1].)

While the three dissenting jurists in *Cunningham* did not find the rule announced in *Miller* to be "watershed," they recognized that there was no true dichotomy between what is "procedural" and what is "substantive," in evaluating whether the rule of *Miller* should be applied retroactively:

> with full appreciation of the intrinsic difficulties and uncertainties of the procedural-substantive dichotomy, I do not find the analysis as 'straightforward' as does the Majority. [Citation.] Rather, I view *Miller*'s categorical bar on the mandatory imposition of life without parole for juveniles as also containing substantive attributes which would require retroactive application. Under the framework of [*Schriro v.*] *Summerlin* [(2004) 542 U.S. 348], I conclude that the High Court in *Miller* made a 'constitutional determination[] that place[d] particular . . . persons . . . beyond the State's power to punish." *Summerlin*, 542 at 351-352. The rule in *Miller* provides that mandatory life without parole is 'a punishment that the law cannot impose upon' juveniles. *Id.* at 352.

(*Cunningham*, at slip opn. p. 5 (dis. opn. of Baer, J.).) Justice Baer noted that while the prohibition in *Miller* may not be as broad as the clearly retroactive prohibitions of *Roper* (barring capital punishment for juveniles) and *Graham* (prohibiting a sentence of life without parole for juveniles convicted of non-homicide offenses), *Miller* is a categorical prohibition against mandatory life sentences without parole for juvenile offenders. (*Ibid*.)

But, in resolving the uncertainties that the *Cunningham* dissenters believed existed surrounding the retroactive application of *Miller*, they found

the fact that the United States Supreme Court's reversal of the companion case of Kuntrell Jackson's conviction on collateral review highly persuasive. (*Cunningham*, at slip opn. p. 7 (dis. opn. of Baer, J.).) "[T]he [United States Supreme] Court made no distinction between the collateral review defendant from Arkansas and the direct review defendant from Alabama." (*Ibid*.) Justice Baer reasoned that "by reversing the lower court's decision as to Jackson and directing further proceedings consistent with its opinion, I find it a fair, if not compelling, inference that the High Court intended to apply the rule to other juveniles on collateral review." (*Ibid*.)

Justice Baer and his colleagues reached the very same conclusion as the Nebraska Supreme Court that "[t]here would have been no reason for the Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review." (*State v. Ragland*, *supra*, 836 N.W.2d at p. 116.)

The *Cunningham* dissenters further recognized that the determination of whether a juvenile will be afforded an individualized discretionary judicial determination based solely upon the happenstance of the moment that a defendant's conviction became final is an inequity that retroactive application avoids. (*Cunningham*, at slip opn. pp. 8-9 (dis. opn. of Baer, J.).) Citing to *Miller*'s clear determination that "children are constitutionally different from

adults for the purpose of sentencing" (*Miller*, *supra*, 132 S.Ct. at 2464), Justice Baer concluded that all of what *Miller* states is different about juveniles should apply equally to juveniles on direct appeal as they do to the juveniles on collateral reviewing seeking *Miller*'s retroactive application. (*Cunningham*, at slip opn. p. 10 (dis. opn. of Baer, J.).)

For the reasons explained above, any argument that *Miller* is not to be applied retroactively would be very difficult to make. Yet, the within petition for writ of habeas corpus filed in the Court of Appeal has been denied, and this Court must now weigh in on this important issue. Petitioner has no other adequate remedy.

This Court should grant review to answer important questions of law and to give guidance to the lower courts on how to treat the many individuals like petitioner who are presently serving unconstitutional sentences.

III.

REVIEW SHOULD BE GRANTED TO DETERMINE IF A 50 YEARS TO LIFE SENTENCE WITHOUT CONSIDERATION OF THE FACTORS OUTLINED IN *MILLER* IS THE FUNCTIONAL EQUIVALENT OF LWOP AND, THUS, UNCONSTITUTIONAL

Recent California cases have confirmed that a sentence imposed on a juvenile which is the functional equivalent of LWOP, absent consideration of the factors outlined in *Miller*, requires reversal for resentencing. None of these decisions have drawn a clear line as to how to determine what is and is not the functional equivalent of LWOP. (See *People v. Thomas* (2013) 211 Cal.App.4th 987, 1013-1015 [juvenile defendant's sentence of 196 years to life for special circumstances murder and attempted murder is the functional equivalent of LWOP; reversed and remanded for resentencing because it predated *Miller* and *Caballero, supra*, 55 Cal.4th 262]; *People v. Argeta* (2012) Cal.App.4th 1478, 1480-1482 [juvenile defendant's minimum aggregate sentence of 100 years for murder and multiple attempted murders is the functional equivalent of LWOP; reversed and remanded for resentencing because it predated *Miller* and *Caballero*].)

Petitioner's sentence of 50 years to life should also be seen as the functional equivalent of LWOP, although he admits his sentence is not as

clearly a functional equivalent of LWOP as the sentences imposed in *Thomas* and *Argeta*.

Recent case authority states the life expectancy of an "18-year-old American male" is 76 years. (*People v. Mendez* (2010) 188 Cal.App.4th 47, 63 (*Mendez*).) The Centers for Disease Control and Prevention published a report in 2010 entitled "Health, United States, 2010" that indicates the life expectancy of a male born in 1990 ranges from 64.5 to 72.7 years of age depending on race. In 1997, the Centers for Disease Control and Prevention, National Center for Health Statistics published U.S. Decennial Life Tables for 1989-1991. At the time that report was published, petitioner was less than eight years old. The report predicted his remaining life expectancy to be less than 62 years. (See Centers for Disease Control, U.S. Decennial Life Tables for 1989–91 (1997) table 8. "Life table for males other than white." (<http://www.cdc.gov/nchs/data/lifetables/life89_1_1.pdf> [as of April 30, 2012].)

Thus, petitioner's total life expectancy would normally be somewhere from 62 to 76 years of age, without accounting for the impact of his incarceration. Using any calculation, petitioner will be well over 66 years old, if alive, before he could ever be eligible for parole. It is not subject to dispute that life expectancy within prisons and jails is considerably shortened. (See

The Commission on Safety and Abuse in America's Prisons, Confronting Confinement (June 2006) p. 11 [discussing persistent problems in U.S. penitentiaries of "prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases"] http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf> [as of April 30, 2013.)

Therefore, petitioner's life expectancy in prison is likely less than 50 years[9] from the time he was sentenced, and, thus, he has no meaningful prospect of ever facing parole or being released. As such, his sentence is the functional equivalent of LWOP, and because it pre-dated *Miller* and the sentencing court took none of the factors outlined in *Miller* into account, his sentence violates the constitutional prohibition on cruel and unusual punishment.

Petitioner is aware of the recent decision in *People v. Perez* (2013) 214 Cal.App.4th 49 (*Perez*). In *Perez*, the Court of Appeal, Fourth Appellate District, Division Three found a defendant who was sentenced at age 17 to a sentence of 30 years to life would be eligible for parole at age 47, and, thus, there will be "plenty of time left" for that defendant to have "some meaningful

[9] Petitioner received 882 days of actual credit at the time of sentencing. If those days are subtracted, petitioner would still have to reach over 66 years of age before ever being eligible for parole.

opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.* p. 57.)

The *Perez* court understood that in order to be upheld on review, a sentence like that imposed here without consideration of the *Miller* factors must allow for "substantial life expectancy at the time of eligibility for parole." (*Perez*, *supra*, 214 Cal.App.4th at p. 57, fn. omitted.) While there might be some argument as to whether petitioner can be expected to die before ever reaching his first parole eligibility date, it does not appear that an argument can be made that he will have a substantial life expectancy at that time. Review should be granted for this reason.

Contrary to the defendant in *Perez*, petitioner received a sentence of 50 years to life. Petitioner is all but guaranteed to die in prison before he would ever be eligible for parole, and is guaranteed to not have a substantial life expectancy at the time he becomes eligible for parole. The difference between the sentence in *Perez* and that received here in impacting the chance of any substantial life expectancy being available upon parole eligibility is massive, and review should be granted to give guidance to the trial courts on how to determine what is and is not the functional equivalent of LWOP, and what is and what is not a substantial life expectancy at the time of parole eligibility for

purposes of reviewing sentences that pass constitutional muster following *Miller* and its progeny.

Petitioner submits that he has no meaningful opportunity to obtain release in the future, will have no substantial life expectancy when he first becomes eligible for parole, and his sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment. (*Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct 2011, 2030].)

Petitioner does not contend that sentences like the one he received are categorically unconstitutional. *Miller* held

> Our decision does not categorically bar a penalty for a class of offenders or type of crime -- as, for example, we did in *Roper* [*v. Simmons* (2005) 543 U.S. 569] or *Graham*. Instead, it mandates only that a sentencer follow a certain process -- considering an offender's youth and attendant characteristics -- before imposing a particular penalty.

(*Miller*, *supra*, 567 U.S. at __ [132 S.Ct. at 2471].) No such procedure was followed here, and that is why review should be granted and petitioner's sentence must be reversed.

CONCLUSION

Based on the foregoing, and based on the this Court's prior order granting review in Case No. S220650, this petition for review should be granted.

Dated: December 2, 2013

Respectfully submitted,

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JOSEPH BONILLA

CERTIFICATE OF APPELLATE COUNSEL
PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.504(d)

I, Derek K. Kowata, appointed counsel for petitioner, hereby certify, pursuant to rule 8.504(d) of the California Rules of Court, that I prepared the foregoing petition for review on behalf of my client, and that the word count for this petition is 6,042 words, which does not include the cover, tables, or attached opinion. This petition therefore complies with the rule, which limits a petition for review to 8,400 words. I declare under penalty of perjury that I prepared this document in Corel WordPerfect, and that this is the word count WordPerfect generated for this document.

Dated: December 2, 2013

Derek K. Kowata
DEREK K. KOWATA
Attorney for Petitioner
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ATTACHMENT “A”